U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

File: 73 831 683 - Las Vegas

Date:

OCT 2 2 1999

In re: JOSE POSADA-LARIN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: G. Reza Athari, Esquire
3365 Pepper Lane, Suite 102
Las Vegas, Nevada 89120

ON BEHALF OF SERVICE: Wayne H. Price
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Reconsideration

ORDER:

PER CURIAM. This case was last before us on June 29, 1999, when we reversed an Immigration Judge's decision that the respondent was statutorily ineligible for any relief from removal pursuant to section 238(b) and (c) of the Immigration and Nationality Act, 8 U.S.C. § 1228(b) and (c). The Immigration and Naturalization Service ("Service") timely filed a motion to reconsider, which reflects that the Service did attempt to file a brief with the Immigration Court on June 10, 1999, during the period that the record should have been retained at the court. See 8 C.F.R. § 3.7. The Service's motion to reconsider is granted. The Service's motion for en banc consideration of this decision is denied.

In its motion the Service contends that the Board's prior decision contains an error of law. The Service argues that the Board failed to cite any authority for the conclusion that section 238 of the Act does not bar this respondent from any eligibility for discretionary relief in removal proceedings.

At the outset we note that the regulations promulgated by the Attorney General have the force of law as to this Board, the Immigration Judges, and the Service. See Matter of Ponce de Leon, Interim Decision 3261 (BIA 1996). It is well settled that this Board's jurisdiction is bound by properly enacted regulations. We find that the regulations implementing section 238 of the Act reflect that the provisions in section 238 of the Act do not apply to aliens who are in removal proceedings pursuant to section 240 of the Act, 8 U.S.C. § 1229a. We further note that the respondent is not barred from relief under the specific eligibility criteria set forth in some detail in sections 212(h) and 245 of the Act, 8 U.S.C §§ 1182(h) and 1255.

The regulations specify that section 238 of the Act governs administrative expedited removal proceedings. 8 C.F.R. §§ 238.1(b), (d), and (e); see also United States v. Benitez-Villafuerte, --- F.3d ---, 1999 WL 642212 (5th Cir. 1999); Hypolite v. Blackman, --- F.Supp.2d ---, Excerpt from page 1999 WL 669763 (M.D.Pa. 1999). The decision rendered in section 238 proceedings is termed a "Final Administrative Deportation Order." 8 C.F.R. §§ 238.1(b) and (d) [emphasis added]. The decision to make a Final Administrative Deportation Order is rendered by a Service officer. 8 C.F.R. § 238.1(d).

The regulations reflect that section 238 administrative expedited removal proceedings before a Service officer and section 240 removal proceedings before an Immigration Judge are separate and distinct proceedings. Hypolite v. Blackman, supra. First, the regulations describe how section 238 proceedings are begun. The regulations, in relevant part, state:

> Removal proceedings under section 238(b) of the Act, shall commence upon personal service of the Notice of Intent [to Issue a Final Administrative Deportation Order, Form I-851] upon the alien . . . .

8 C.F.R. § 238.1(b)(2).

The regulations mandate that those aliens in expedited removal proceedings under section 238 of the Act shall be served with a Form I-851. See also United States v. Benitez-Villafuerte, supra.

The regulations also set forth procedures for when an alien is improperly placed in section 238 administrative expedited removal proceedings. 8 C.F.R. § 238.1(d)(2)(iii) mandates that when a Service officer determines that an alien is not amenable to administrative expedited removal under section 238 of the Act, the alien should be placed in section 240 removal proceedings. The regulations dictate that such alien is placed in section 240 removal proceedings with the issuance of a Notice to Appear (Form I-862). 8 C.F.R. § 238.1(d)(2)(iii). The regulations further prescribe the procedure to follow when the Service wishes to place an alien in expedited removal proceedings pursuant to section 238 of the Act when the respondent is already in removal proceedings under section 240 of the Act. 8 C.F.R. § 238.1(e) states that:

> In any proceeding commenced under section 240 of the Act which is based on deportability under section 237 of the Act, if it appears that the respondent alien is subject

> subject to removal pursuant to section 238 of the Act, the immigration judge may upon the Service's request, terminate the case and, upon such termination, the Service may commence administrative proceedings under section 238 of the Act. However, in the absence of any such request, the immigration judge shall complete the proceeding commenced under section 240 of the Act.

In the instant case, there is no evidence that the respondent was issued a Notice of Intent (Form I-581), or that the Service sought to terminate the section 240 removal proceedings to commence administrative proceedings under section 238 of the Act. 8 C.F.R. §§ 238.1(b)(1), (2), and (e). As the respondent was issued a Notice to Appear (Form I-862), he was in removal proceedings pursuant to section 240 of the Act. Therefore, we are not persuaded that the respondent is barred in these proceedings from applying for discretionary relief under section 238(b)(5) of the Act. See generally Matter of Cerna, 20 I&N Dec. 399, 404 (BIA 1991); 8 C.F.R. § 3.2(b). On reconsideration, we do not find that our initial decision in this case was in error. Accordingly, the following order will be entered.

FURTHER ORDER: The June 29, 1999, decision of this Board is reaffirmed.

FOR THE BOARD